

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
TURNPIKE TOBACCO,	:	DETERMINATION
DIVISION OF VALLEY STREAM	:	
DISTRIBUTORS CO., INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period March 1, 1983	:	
through June 26, 1986.	:	

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Petitioner, Turnpike Tobacco, Division of Valley Stream Distributors Co., Inc., 171 East Industry Court, Deer Park, New York 11729, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through June 26, 1986 (File No. 804090).

On August 31, 1987, petitioner waived a hearing and submitted the matter for determination based upon the Division of Taxation file as well as petitioner's submissions on said date. After due consideration of the record, Daniel J. Ranalli, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether reasonable cause exists for abatement of the penalties asserted under Tax Law § 1145(a)(1)(i), (vi).

FINDINGS OF FACT

1. As the result of an audit conducted by the Suffolk District Office, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against Turnpike Tobacco, a Division of Valley Stream Distributors Co., Inc. (hereinafter "petitioner"), on August 5, 1986, wherein the following assessments were made:

- a) For the period March 1, 1983 through June 26, 1986, total tax due of \$123,576.30 plus penalty of \$26,944.24 and interest of \$28,858.20, for a total amount due of \$179,378.74.

- b) For the period June 1, 1985 through February 28, 1986, additional penalty of \$3,235.50 which was explained as follows: "Effective 9/1/85, a penalty equal to 10% of the additional tax due has been imposed as authorized by Section 1145(a)(1)(vi) of the tax law. This is in addition to Section 1145(a)(1)(i) penalties."

2. On January 15, 1986, Louis Zucker, as president of petitioner, executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law. Said consent extended the time within which taxes for the period December 1, 1982 through May 31, 1983 could be determined to anytime on or before June 20, 1986.

3. On June 4, 1986, David Schneidman, as secretary of petitioner, executed a consent which extended the time within which the aforesaid taxes for the period March 1, 1983 through August 31, 1983 could be determined to anytime on or before August 20, 1986.

4. Petitioner operated two stationery stores, one in Nassau County and one in Suffolk County.

5. On August 8, 1986 petitioner submitted a check for \$152,434.50. Said amount was in payment of the tax assessment of \$123,576.30 and interest of \$28,858.20. The sole remaining issue herein is whether the penalties asserted may be abated due to reasonable cause. The total of the penalties asserted is \$30,179.74 (\$26,944.24 plus \$3,235.50).

6. During the period at issue, Turnpike Tobacco ("Turnpike") was a retail operation of Valley Stream Distributors Co., Inc. ("Valley").

7. The sales tax, which was assessed and paid, related to two Turnpike stores. One was located in the Nassau Mall, the other in the Sunvet Mall.

8. Mr. Lou Zucker, a minority shareholder of Valley, operated and controlled the two stores until his retirement in early 1986.

9. During the period at issue, Valley, in its principal business, had sales of approximately \$100 million per year. Its division, Turnpike, had sales of approximately \$1 million per year.

10. The accounting firm which represented Valley did not assign an accountant to prepare or review Turnpike's sales tax returns. The firm assigned a paraprofessional to Turnpike who

merely worked from sales summary sheets. The paraprofessional did not make, or have the professional background or competence to make, an in-depth review of the manner in which sales were recorded at the Turnpike stores.

11. The sole principals of Valley, Mr. Stanley Sedlitz and Mr. David Schneidman, reviewed only the summary sheets showing that Turnpike did collect sales taxes. Considering the sales volume of Valley as compared to Turnpike, they felt that it was reasonable to devote their energy and attention to Valley and to rely on Mr. Zucker to properly operate Turnpike.

12. Mr. Zucker personally visited each of the Turnpike stores approximately once or twice each year, usually at a time when inventory was being taken.

13. Each of the Turnpike stores employed a manager to oversee the operation of each store. The managers were paid at the rate of \$5.25 per hour during the periods at issue.

14. Sales were rung up on Turnpike's registers in accordance with a handwritten sheet of paper taped onto the register at each location. These sheets of paper were made up by one of the store managers and were believed to convey an accurate account of how the sales were to be rung up.

#### SUMMARY OF PETITIONER'S POSITION

15. Petitioner claims that the two retail Turnpike stores were cigarette and tobacco shops which did not carry a large variety of items and that the error resulting in the failure to pay the proper tax was a single item error which was continuously repeated. Petitioner alleges that, based on the above, it has established that its failure to pay the proper amount of tax was not willful or negligent, but rather it was due to reasonable cause.

#### CONCLUSIONS OF LAW

A. That the penalties asserted under Tax Law § 1145(a)(1)(i), (vi) for late payment of tax and underreporting of tax in excess of 25 percent of the amount of tax required to be shown on the returns, may be abated if petitioner establishes that such late payment and underreporting were due to reasonable cause and not willful neglect.

B. That 20 NYCRR 536.5(b) (20 NYCRR former 536.1[b]) provides:

"Reasonable Cause. In determining whether reasonable cause exists, either as a basis for remitting assessed interest or penalties or as grounds for remitting interest or penalties upon the late filing of a return or payment, the taxpayer's previous compliance record may be taken into account. Reasonable cause for failure to file a return on time must be affirmatively shown by the taxpayer in a written statement. Grounds for reasonable cause, where clearly established, may include the following:

- (1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;
- (2) destruction of the taxpayer's place of business or business records by fire or other casualty;
- (3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;
- (4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;
- (5) pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency; or
- (6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

C. That in Matter of Irving Reinstein (State Tax Commission, May 23, 1985) the State Tax Commission found that where the failure to pay over the sales tax was due to error by a bookkeeper who computed sales tax, reasonable cause did not exist. "Delegation of the duty to mail in tax payments to a bookkeeper is not reasonable cause" and the penalties imposed were sustained.

D. That reasonable cause cannot be found in a case where, as in the instant case, the underreporting of tax related to errors by a person or persons totally unversed in tax related

matters to whom petitioner delegated tax computation duties.

E. That the petition of Turnpike Tobacco, Division of Valley Stream Distributors Co., Inc. is denied and the two notices of determination and demands for payment of sales and use taxes due issued August 5, 1986 are sustained with respect to the penalties at issue herein.

DATED: Albany, New York  
December 17, 1987

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ADMINISTRATIVE LAW JUDGE